



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT
800 ARMY PENTAGON
WASHINGTON DC 20310-0600



SEP 04 1998

DAIM-BO

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Guidance on Using Institutional Controls (ICs) in the CERCLA Process

1. The purpose of this memorandum is to provide MACOMs and Installations guidance on decisions under CERCLA regarding use of Institutional Controls. The enclosed guidance covers how to properly document CERCLA decisions leading to the use of ICs, as well as responsibilities involved in planning, programming and budgeting for IC maintenance.
2. In April 1998 Ms. Goodman, DUSD(ES) formed a GSA and tri-service workgroup tasked with developing DOD IC policy. The objective of this policy is to address DOD responsibilities at BRAC and Active military installations on ensuring ICs are maintained, and will focus on IC issues after the decision to use ICs has been made by the service component. The enclosed guidance was developed due to numerous questions from the MACOMs and my staff regarding the decisions leading up to the use of ICs. This guidance, while heavily focused on ICs as they relate to property transfers in BRAC, has general IC principles that are applicable to Active military installations.
3. Persons from my staff listed below, will be soliciting your input on DOD's Draft policy which is expected to be complete in September 1998, with a final policy complete in February 1999. Point of contact for IC issues at BRAC installations is Ms. Robin Mills, 703-693-3501 or email millsrd@hqda.army.mil. For IC issues at active military installations please contact LTC Gary Pesano, (703) 693-0671, or email pesangl@hqda.army.mil.

Encl
as

for J. C. Munnig
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RECEIVED TIMESEP. 8. 9:31AM

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SUBJECT: Army Guidance on Using Institutional Controls in the CERCLA Process

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Army Guidance for Using Institutional Controls in the CERCLA Process

1. References:

- a. USD(A&T) memorandum, "Responsibility for Additional Environmental Cleanup after Transfer of Real Property, 25 Jul 97
- b. DUSD(ES) Fact Sheet, Institutional Controls, What they are and how they are used, Spring 1997
- c. DUSD(ES) Guidebook, "A Guide to Establishing Institutional Controls at Closing Military Installations", February 1998
- d. SFIM-AEC-ERO memo, 17 Jul 98, subject: Guidance for U.S. Army Compliance with CERCLA Five-year Review Requirements at Army Installations

2. Applicability

This guidance is applicable to National Priorities List (NPL) and Non-NPL Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) decision making at Base Realignment and Closure (BRAC) and active installations. Although the focus of this guidance is on using ICs in the CERCLA decision making process, ICs are also commonly used in decision making under other environmental legal authorities such as RCRA and UXO cleanups. The general IC principles outlined in this guidance for planning, programming and budgeting for IC maintenance should be used for all ICs regardless of the cleanup process being used. All ICs selected under CERCLA and other authorities, should be included in the installation Master Plan at active installations and in the Finding of Suitability to Lease (FOSL) or Finding of Suitability to Transfer (FOST) if the property is proposed for transfer or lease.

3. Background

An IC or land use restriction is a legal or administrative mechanism that limits access to or use of property, or warns of a hazard. Examples include deed restrictions, easements, notices/warnings, covenants, zoning, well drilling prohibitions, or well use advisories and appropriate analogous practices and procedures at active installations. Some, but not all, land use restrictions constitute "Institutional Controls" (ICs). The term "Institutional Controls" is used in the National Contingency Plan to refer to land use restrictions used in the CERCLA process and generally refers only to those land use restrictions imposed because of environmental situations, conditions, or risks at a site. ICs are commonly used in CERCLA to supplement an environmental remedy or as the actual remedy of choice.

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4. General Rule and Exception for ICs in the CERCLA Process:

a. **General Rule:** Any IC imposed because of a possible CERCLA risk at a site constitutes a "remedy" under CERCLA and must be considered and selected in accordance with the CERCLA remedy selection process. For example, if protection of human health and the environment at a particular site is dependent upon restricting future land use in a manner consistent with use assumptions made in the risk assessment, such land use restrictions are "imposed because of a possible CERCLA risk at a site," and constitute a CERCLA remedy.

b. **Exception:** There are circumstances when there is an unusually high level of certainty that land use will not change in the future. For example, special legislation or other statutory requirements directing a specific use of the property. In these specific cases when we determine during screening or site-specific risk assessment that contaminant levels present no unacceptable human health risk based on this mandated future use, any restrictions based upon the mandated future use are not viewed as "imposed because of a CERCLA risk at a site" and therefore do not constitute remedies. With respect to such sites, we conclude that no further action is required at the site. At this point the installation should prepare a No Further Action (NFA) Decision Document (DD) or Record of Decision (ROD), memorializing the exposure assumptions given the mandated land use as well as the results of the baseline risk assessment or risk-based screenings. Any restrictions based on the exposure assumptions should be captured in the NFA DD and in the FOST/FOSL or installation Master Plan for active sites.

5. Considering ICs in RI/FS

If an IC is being considered as a remedial alternative or a part of a remedial alternative, it should be analyzed in the risk assessment and feasibility study and be memorialized within the DD (non-NPL) or ROD. In order to make informed decisions regarding ICs as remedial alternatives installations should:

a. Consider not only the no action alternative and IC remedial alternative, but also one or more alternatives consistent with property use without restriction that is protective of human health and the environment. While this option may not be affordable or practicable due to the known future use, the analysis will allow decisions makers to compare life-cycle IC cost with the more conservative clean-up alternative.

b. In evaluating the maintenance costs associated with institutional controls, the installation must research the state and local requirements/options for IC management. Generally, the maintenance costs associated with institutional controls should reflect only costs associated with existing requirements/processes, such as CERCLA five year reviews. Additionally, it is important that the installation/MACOM legal representatives analyze any relevant state real property or environmental law, because options for

state/local maintenance will vary from state to state. References 1b and 1c are good resources to use as launching points to research various local options.

c. For BRAC property transfers it is crucial that the installation involve the Local Reuse Authority (LRA), environmental regulatory agencies, community stakeholders and the Restoration Advisory Board early in the environmental remediation process. The LRAs especially, must clearly understand the implications of the ICs imposed as part of remedial action decisions to ensure appropriate land use planning.

6. Documenting ICs as CERCLA Remedies

Any DDs or RODs requiring ICs should describe the necessary IC in detail, including the assumptions made concerning current and future land use and/or exposure scenarios as well as a discussion of the contaminants remaining at the site. The land use scenario(s) used in risk assessment upon which the risk management and remedy decisions are premised should be stated. The DD or ROD should discuss the specific institutional control and describe the type of land use restriction language that would be required if the property were to go out of the control of the Army, such as Base Realignment and Closure (BRAC) property. When transferring or leasing property, this information from the DD or ROD will be put in the FOSL or FOST. The FOST/FOSL will be subsequently used to put the necessary restrictions in legal agreements such as deeds, leases, or other documents as appropriate.

In addition, the DD/ROD should clearly describe the process and conditions by which an institutional control could be removed from the property. Typically, IC removal will require formal modification of the DD or ROD and associated modifications to the Installation Master Plan and real property documents. In some cases the removal of an IC could constitute a significant change to a DD or ROD and would require the issuance of a new DD or ROD in accordance with NCP requirements.

7. Responsibilities for Maintaining ICs

Protection of human health and the environment is both a goal and a requirement of the environmental remediation process. The Army must ensure that this requirement is met, even when the property is no longer under direct Army control. Therefore, the installation should plan for any necessary IC maintenance as part of its remedy selection process. IC maintenance requirements will vary from site to site and should be developed in coordination with appropriate stakeholders such as LRAs, RABs and environmental regulators. The cost estimate for the remedial action should include any funding required for IC maintenance. In addition the installation should ensure that any

continued resource requirement for maintaining ICs are included in the installations cost-to-complete database to ensure adequate resource programming. As much as practicable installations should rely on existing processes, such as CERCLA five-year reviews to accomplish IC maintenance. The bottom line is that the IC remedy the Army has selected is the Army's responsibility.